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TPPA Environment Chapter & Chair's Commentary Posted by Wikileaks Issues for NZ¹

The consolidated draft text of the Environment chapter of the Trans-Pacific partnership Agreement and the accompanying chair's commentary have been posted in [Wikileaks](#). The documents are dated 24 November 2013, the final day of the Salt Lake City round in November.

The chair's commentary records the countries that objected to, and in some cases that supported, different aspects of the text. They are consistent with the [chart](#) that Wikileaks posted in December showing one country's assessment of the 12 countries' positions on many TPPA issues.

Overview

The Environment Chapter addresses matters of conservation, environment, biodiversity, indigenous knowledge and resources, over-fishing and illegal logging, and climate change, among others. It might be expected to provide balance to the commercial interests being advanced in the other chapters, and genuine protections that are consistent with international environmental law.

Instead of a 21st century standard of protection, the leaked text shows that the obligations are weak and compliance with them is unenforceable. Contrast that to other chapters that subordinate the environment, natural resources and indigenous rights to commercial objectives and business interests. The corporate agenda wins both ways.

The Strategy of a Consolidated Text

The Environment chapter is one of four that have been at stalemate for several years, the others being intellectual property, transparency in healthcare technologies and state-owned enterprises.

The leaked chairs' text of the chapter and the accompanying chairs' commentary provide an insight into the process that ministers adopted to break the deadlock on the core unresolved chapters. Both documents say the Ministers in Brunei asked Canada, as chair,² to produce a consolidated text. It is not clear whether the same request was made to the chairs of the other working groups, but a similar kind of approach would seem likely.

A similar process has proved very controversial at the World Trade Organization (WTO) where it has been used to attempt to break deadlocks in the [Doha round](#). It was deployed most recently at the [WTO ministerial conference](#) in Bali, which immediately preceded the December 2013 meeting of TPPA ministers in Singapore.

A chairs' text is meant to be a circuit breaker in negotiations that have become bogged down around a formal text by leaving that text behind. It can be an effective

¹ This note should be read alongside any line-by-line commentaries on the text.

² It is unclear why the documents refer to chairs in plural

catalyst if all the countries buy into the process. Strong outlier positions can be diluted by the chair's adoption of compromise or majority positions. The proponents can be marginalised and treated as obstructive if they insist on restoring them, especially if the chair has discretion over what to include and comes from a country that has a strong position themselves. That appears not to have been the approach of Canada in this case, but it could arise if the same approach has been taken for other chapters – especially ones that the US chairs. Successfully restoring positions to the text relies initially on the effectiveness and persistence of officials and subsequently on the relative power of ministers among the Group of 12, and the trade-offs they are willing to make if they consider the issue to be a red line.

The Politics of the Environment Chapter

The chairs' report shows the main outlier for the Environment chapter is the US. There are various reasons for that. There is a long history of resistance to environment rules being included in WTO agreements, and certainly becoming subject to trade sanctions through dispute settlement processes. Most of the FTAs that do not involve the US use hortatory language and are not enforceable.

Some parties have commercial interests and political sensitivities they wish to protect. The memorandum by the US environmental groups gives examples of over-fishing and shark-finning, illegal logging, and trade in endangered species and wildlife.

Australia, NZ the US and Canada were the four countries that voted against the adoption of the United Nations Declaration on the Rights of Indigenous Peoples, which recognises indigenous rights in relation to genetic resources and biodiversity.

Parties have divergent positions on Multilateral Environmental Agreements. The US has not signed the Convention on Biological Diversity and very few of the twelve countries have signed or ratified the subsequent Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization. The US is also not a signatory to the Kyoto Protocol of the United Nations Framework Convention on Climate Change.

The US Political Dilemma

The US has a particular political dilemma. The text falls far below the standards it has insisted are included in all US free trade agreements since May 2007, which resulted from a deal reached between the Democrat-controlled Congress and President George W Bush.

The most fundamental problem for the US is the refusal of all the other countries to agree that the chapter should be subject to the same dispute settlement mechanism as the rest of the agreement. It provides for consultation at officials and ministerial levels, leading to arbitration and agreement to a plan of action, but there are no penalties if the state does not implement the plan.

Obama is going to find this a very hard sell to domestic constituencies. The timing of the leak could hardly be worse. On 9 January 2014 a Bill seeking fast track authority was presented to the Congress. The controversial fast track process requires the Congress to accept or reject the deal as a whole and imposes a strict time limit on debate. The numbers were already stacking up against the Bill, with Democrats especially critical of the erosion of their powers and the secrecy of the negotiations, as well as the reported content. This leaked environment chapter will further erode support among Democratic

members of the House of Representatives who are up for re-election later this year. Obama is going to have to rely heavily on unfriendly Republicans.

Scope of the chapter

The scope of the chapter is unclear. There are references to environmental laws, policies, practices and proceedings, which is potentially very broad. But only 'environmental laws' is defined, and defined narrowly as laws whose *primary purpose* is either (a) protection of the environment or (b) preventing danger to human life or health, and only when those laws pursue this purpose through rules that relate to pollutants or environmental contaminants, control of environmentally hazardous or toxic materials, or conservation of wild flora or fauna. The chapter would not, for example, apply to resource management laws that seek to balance a range of commercial, recreational and environmental interests.

The chapter also only applies at the central/federal government level, whereas a large number of environmental regulations and decisions are sub-federal.

Indigenous rights and Biodiversity

Most of Article SS.13 on Trade and Biodiversity is weak and aspirational, drawing from the Convention on Biological Diversity (CBD). It will do nothing to neutralise rules in other chapters that enable commercial exploitation of biodiversity, especially the intellectual property chapter.

In paragraph 2, for example, parties commit to 'promoting and encouraging the conservation and sustainable use of biological diversity and sharing in a fair and equitable way the benefits arising from the utilization of genetic resources.'

The sovereign rights of governments over natural resources to determine access to them and to legislation in paragraph 4 seems aimed at reasserting state control *vis-a-vis* indigenous peoples and local communities, not just over foreign interests.

Obligations in Article 13 are also subject to domestic legislation, which potentially makes them even more meaningless.

Prior consent to accessing genetic resources and fair and equitable sharing of the benefits in paragraph 5 relates to the state, not to indigenous peoples or local communities.

This falls far short of the UN Declaration on the Rights of Indigenous Peoples, which all the parties except for the US have now signed. The Obama administration announced in 2010 its intention to do so. Article 31 of the Declaration says:

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Four countries (Malaysia, Peru, Vietnam and Brunei) want the provisions to extend to derivatives of genetic material, which is where the commercial benefits lie. This is

consistent with the Nagoya Protocol, which refers in Article 5 to fair and equitable sharing of the benefits from the utilisation of genetic resources *as well as subsequent applications and commercialisation*.

Peru and Mexico also want a requirement in paragraph 3 for indigenous peoples and local communities to approve and be consulted on conservation and sustainable use of their knowledge, innovations and practices, and the fair and equitable sharing of benefits from their use. That is consistent with both the Nagoya Protocol and the UN Declaration.

New Zealand does not support either of these stronger positions. That is likely to create issues with iwi, and with the Maori Party, as the changes being proposed to strengthen the role of indigenous peoples appear to be consistent with the Waitangi Tribunal report *Ko Aotearoa Tenei* (WAI 262) on Maori traditional knowledge and resources.

The US says it cannot agree to the entire Article because it is not a party to the CBD.

Other issues for NZ

New Zealand is part of the WTO group 'Friends of the Fish'. The proposals in Article SS16.6 to restrict fisheries subsidies that contribute to overcapacity and overfishing fall far short of the positions they have been promoting. These are detailed in the US environment groups' memo.

Article SS16.4 does not require a ban on shark finning.

In Article SS15 the parties merely agree to discuss ways to deal with climate change with possible links to the APEC process. The US and Australia oppose even that provision. There is no reference to the regional carbon-trading scheme that Trade and Climate Change Minister Tim Groser has been promoting, which would expose climate change measures even more deeply to speculative finance markets, although there is general recognition of market-based mechanisms.

Other chapters dealing with the environment

The environment chapter is one of many – the TPPA is generally described as having 29 chapters or sections of chapters. Environment policy, regulation and practices are affected by many other chapters, which impose substantive obligations and rules.

The most egregious threat to the environment is the investment chapter, in particular the prior consent by all countries except Australia to investor-state dispute settlement (ISDS). The vast majority of investment arbitrations under similar agreements involve natural resources, especially mining, and have resulted in billions of dollars of damages against governments for measures designed to protect the environment from harm caused by foreign corporations. The US is also demanding that contracts between investors and states that involve natural resources also have access to ISDS.

Chapters that may impact on environmental measures, with some examples, include:

- *investment*, eg challenges to tighter rules on mining and remediation rules, bans on fracking and nuclear energy, performance requirements on foreign investors to use of clean technology, restrictions on numbers and locations of waste plants or eco-tourism projects, not lowering environmental standards to attract investors
- *goods market access*, eg tariffs (see Article CSR8 on zero tariffs)

- *non-tariff measures* – eg green technologies for motor vehicles, prescribed manufacturing or processing methods
- *customs*, eg preferential processing for smaller cc vehicles
- *agriculture*, eg differential tariffs on organics
- *subsidies and countervailing measures*, eg for green or clean energy production
- *sanitary and phytosanitary* (quarantine), eg. bans on use of certain pesticides in products, bans or restrictions on imports of GE products
- *technical barriers to trade*, eg. GE tracing labelling requirements, food content labelling, emission standards (see also non-tariff measures)
- *intellectual property*, eg. new technologies, seeds, patented food products, organics trademarks, biodiversity, genetic resources
- *cross-border services* eg. e-services including computerised remote operation of oil and gas extraction, engineering and other professional services, remediation services, delivery of environmental technologies; the chapter is likely to crossover with investment on local establishment of commercial activities, eg waste disposal and water companies, mining and fisheries processing operations, etc.
- *financial services* eg. tradeable financial instruments such as energy derivatives, carbon credits.

These chapters have their own rules, which would complement and possibly conflict with those in the environment chapter. Many will also have their own committees to review compliance, obligations and procedures for consultation, and enforcement mechanisms. For investment those mechanisms include investor-state dispute settlement.

The *Transparency and Regulatory Coherence* chapters require decision-making and regulatory processes that are also additional to those in the Environment chapter. They may involve preparation and disclosure of documents, right of participation of foreign commercial interests in domestic decision making, review procedures, use of light handed regulation, and evidence to support the level of regulatory intrusion on commercial interests. These may collectively provide multiple pressure points on a government and assist investors to compile a dossier of material to use in a dispute, including investor-state disputes.

The standard general exceptions provisions are mostly subject to a ‘necessity’ test, requiring the government to adopt the measure for conservation, environment or human health purposes that intrudes least on commercial interests. It must also not be discriminatory or a ‘disguised barrier to trade’. The US has not agreed that this exception should apply to the investment chapter, although it is facing pressure to do so.

Unlike other leaked chapters, there is very little guidance on how the chapters inter-relate or what happens if there is a conflict.

Professor Jane Kelsey
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